Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1284

IRVING BURTON NESSON,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIRST CIRCUIT

Irving Burton Nesson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled action on Febeuary 2, 1968.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the First Circuit is attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) The Trial Court erred in denying defendant's Motion for Particulars.

(2) The denial of defendant's Motion for Particulars together with the delay in prosecution was in violation of the due process clause of the United States Constitution.

STATEMENT OF THE CASE

The defendant, Irving Nesson, has been in the furniture business for the past 25 years, both as an employee and as a retail store owner. His financial status was such that in the early part of 1962 he was called into a conference by a lawyer whose firm represented many of the creditors of Irving B. Nesson, d/b/a Fiesta Furniture Company. As a result of said conference at the lawyer's office, Mr. Nesson was persuaded to sign a trust mortgage agreement on March 2, 1962, wherein the law firm of Cohn, Riemer and Pollack, through its representative, became the trustee under the terms of the said agreement for the benefit of creditors. (Ex. Govt. 13, 1-36)

Under the terms of the trust agreement, Mr. Nesson agreed to turn over all of his property including a list of creditors and a list of his assets in contemplation of an orderly resolution of his debts with the law firm representing a large number of his creditors. Subsequently, the trust agreement was terminated by the same law firm member who had been designated as trustee thereof. Thereafter, the same firm filed an involuntary petition in bankruptcy on April 3, 1962, against Irving B. Nesson, d/b/a Fiesta Furniture Company (R. 1-39).

At this period in the history of the defentant, Irving B. Nesson, it should be noted that the physical premises of Fiesta Furniture Company had been destroyed by a fire. Mr. Nesson was operating his business through his home, using canvassers to sell furniture door to door. The defendant, Mr. Nesson, was financing the furniture purchases through the Time Finance Company, the procedure being that upon obtaining a sale, he would notify Time Finance Company and submit to them the buyer's contract for purchase of the particular goods. The Finance Company would then become the assignee of the contract as collateral for the advance of monies to Mr. Nesson. (R. 1-11)

The trustee in bankruptcy was appointed by the Referee and Joseph Brauntstein, Esquire, of the same law firm became attorney for the trustee. He had a list of the creditors which the defendant, Nesson, had furnished in March, 1962. The representative of the Finance Company testified that he had received no word of a bankruptcy proceeding against Irving B. Nesson until sometime in 1965. There were five checks identified dated March 19, 1962, March 23, 1962, March 16, 1962, April 2, 1962 and March 30, 1962. These checks were later on testified to as having emanated from Time Finance Company and then having been turned over to Mr. Nesson for cashing. (R. 1-11) All noted transactions occurred prior to the involuntary petition in bankruptcy.

On or about March 16, 1966 the United States Attorney presented to the Grand Jury certain evidence resulting in an indictment in five counts, Criminal No. 66-43. The counts of the said indictment referred only to sums of money of the Time Finance Company. The indictment charged that the defendant, Irving B. Nesson, d/b/a Fiesta Furniture Company, an individual proprietorship, did, with intent to defeat the bankruptcy laws, unlawfully, willfully, knowingly and fraudulently conceal from the trustee in bankruptcy property belonging to the estate of the said benkrupt, and concealing and transferring property in contemplation of a bankruptcy proceeding. A motion of the particulars was filed by the defendant and it was denied.

The trial took place on May 31, June 1 and 2, 1967.

The defendant's Motion for a Directed Verdict was denied.

The defendant was found Guilty on each count, and thereupon an appeal was taken to the U. S. Court of Appeals for the First Circuit, which Court entered its judgment on February 2, 1968, which judgment is the subject of this petition.

REASONS FOR GRANTING THE WRIT

(1) The Trial Court erred in denying defendant's Motion for Particulars.

Prior to the trial the defendant moved the court for a bill of Particulars. (Ex. Govt. 14, 1-44) This motion was denied, (Ex. Govt. 14, 1-44) and the defendant's preparation of his defense was seriously jeopardized by the Court's negative action.

The Grand Jury returned the indictment on March 16, 1966, pertaining to matters occurring between March 16, 1962 to April 2, 1962. The great delay of four years in Government's prosecution of the said charges enhanced the necessity of disclosure to the defendant and his attorney of the nature of the charges contained in the indictment and more specifically of the meaning of amounts of the items in the five counts of the indictment.

During the trial the Government presented evidence with respect to the dollars and cents items contained in the five counts of the indictment. This evidence came as a surprise to the defendant and his attorney because at no time prior to the trial was there any indication what the said dollars and cents items in fact represented. It is important to note that the alleged transactions occurred before the involuntary bankruptcy petition was filed and before the defendant had any notice of the involuntary bankruptcy petition.

The appellant's defense was predicated on a lack of knowledge of the bankruptcy proceeding and a lack of fraudulent intent. More specifically the defendant asserted that the alleged transactions were ordinary business transactions.

The facts of the case indicate that in February of 1962 the furniture store of the defendant had burned together with

all his records. The defendant testified that he thereafter conducted his business without a store and inventory by selling furniture on consignment; that he engaged persons to solicit orders; that he discounted the purchase contracts with Time Finance Company; that with the proceeds of these loans he then purchased the furniture, paid for its delivery and paid a commission to the solicitors.

The failure to provide particulars prior to trial prevented the defendant from adequately preparing his defense. He was thus not prepared to corroborate his testimony. The events had occurred four years past and he was unable to recall with precision the parties to the transactions. Given the necessary particulars the defendant and his attorney would have attempted to locate the various parties to the transactions, and any records available which would have corroborated his testimony. (Ex. Govt. 9, 1-27, 3-54)

The defense had only the copy of the indictment to identify the alleged charges which referred to some stale financial matters occurring four years previously and at a time of great financial turbulence. It was therefore prejudicial error for the trial court to deny the defendant's motion for particulars. Even the Court of Appeals in its opinion recognizes that the Trial Court was "unnecessarily restrictive."

Rule 7(f) of the Federal Rules of Criminal Procedure permits the defendant to seek additional information to clarify the indictment by motion for a bill of particulars. The standard for granting a rule 7(f) motion was previously whether such clarification was necessary to prevent surprise or possible double jeopardy. Wong Tai v. United States, 273 U.S. 77. Recently the Supreme Court of the United States, in Dennis v. United States, 384 U.S. 855, at page 873, recognized that

disclosure rather than suppression of relevant materials was required for the proper administration of justice, that "exceptions to this (disclosure) are justifiably denied only by the clearest and most compelling considerations." (Emphasis added.) No such considerations existed in this case.

With these same beliefs of justice in mind the Supreme Court of the United States, in the October term of 1965, ordered that the Rules of Criminal Procedure for the United States District Courts be amended (39 F.R.D. 252). Rule 7(f) was so amended by adopting the Advisory Committee's proposed amendment eliminating the requirement of a showing of cause before allowing the motion for particulars (39 F.R.D. 170). In the words of the Advisory Committee on their proposed amendment to Rule 7(f):

> The amendment to the first sentence eliminating the requirement of a showing of cause is designed to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases. (Id.)

In the context of the present case, there was no compelling reason presented for the denial of the defendant's motion for a bill of particulars. This motion was wrongfully denied since the defendant was not informed of the nature of the charges against him with sufficient precision to enable him to adequately prepare his defense for trial and to obviate surprise.

(2) The denial of defendant's motion for particulars together with the delay in prosecution was in violation of the due process clause of the United States Constitution.

There can be no dispute that there was a delay between the Commission of the offenses charged to have been committed by the defendant herein and his prosecution therefor. The

dates of these offenses and the date of the indictment makes this clear. The defendant's position is that this delay in proceeding against him as a potential defendant, coupled with the subsequent denial of his motion for particulars, was unreasonable, oppressive and unjustifiable, and as such a denial of due process affecting his ability to effectively defend himself. Nickens v. U.S. 323F 2d 808,810, N.2 (1963), Ross v. U.S., 349F 2d 210,(1965). Though these cases refer to intentional delays in prosecution it is submitted that the same principles should apply in cases such as the one presently before the Court where there has been a delay in prosecution and a motion for particulars has been denied. In view of this delay in prosecuting the defendant the latter's interest in being informed of the nature of the charges against him with sufficient precision to enable him to prepare his defense for trial and to obviate surprise, which are the purposes of a bill of particulars, U.S. v. Finnegan, 189F. Supp. 728 (W.D. Ohio, 1960). U.S. v. Abrams, 29F.R.D. 178, (S.D. N.Y. 1961), became of paramount importance. The interest of the defendant in this regard was not so considered by the Trial Courtin its act of denying his motion for particulars. The clearest and most compelling considerations in this case require disclosure rather than suppression to insure the proper administration of justice and fairness which are the prime considerations of due process of law.

The defendant was prejudiced by the delay in prosecution. It is submitted that such prejudice, which is due to delay in prosecution, does not have to be proven beyond a reasonable doubt nor even by a preponderance of the evidence, but a "plausible claim of inability to recall or reconstruct the events

of...the offense is all that is necessary" Ross v. United States supra, at 215, Jackson v. United States, 351F 2d 821 (1965). The existence of such prejudice may also be presumed from the length of the delay. Jackson v. United States, supra. In the cases cited the delays were intentional but they were considerably shorter than the delay in this case and prejudice was found. In the case at hand certainly such prejudice to the defendant could be found and in sufficient quantity to warrant the allowance of defendant's motion for particulars as a matter of basic justice.

At the time of the events in question defendant was in financial distress. He was operating his business you might say on a shoestring. People would be reluctant to deal with him except on a cash basis. Under the circumstances no records were kept by him of transactions. The Government's witnesses, on the other hand, were not operating under such stress. Records were kept as usual in the course of their going businesses and therefore dates and events were more readily recalled. The defendant then was at a decided disadvantage due to the delay in prosecution. His memory would grow dim with the passage of time. Prospective witnesses would move away or disappear. With each day the defendant became less able to make out a defense. The balance of advantage shifted to the Government the more the Government lagged. I do not say the Government acted in bad faith, but its lagging "caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith." Petition of Provoo, 17 F.R.D. 183, 202. On all the evidence the defendant argues that the delay in prosecution prejudiced the defendant in his ability to defend himself in violation of due process of law and that such prejudice could have been and in fact should have been removed by the Trial Court granting defendant's motion for particulars.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 6988.

IRVING BURTON NESSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

S. Roy Remar for appellant.
David M. Roseman, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, was on brief, for appellee.

February 2, 1968.

PER CURIAM. The defendant was charged in a five-count indictment with intent to defeat the bankruptcy laws by knowingly and fraudulently transferring and concealing certain assets. 18 U.S.C. § 152. Each count recited that involuntary bankruptcy proceedings were filed against him as an individual proprietor doing business as Fiesta Furniture Company on April 3, 1962. The five counts related to various dates in the preceding three weeks. Defendant was found guilty on all five counts and given concurrent sentences. On this appeal he alleges that the evidence was insufficient to convict; that the court erred in permitting the impeachment of his testimony by the evidence of a

prior conviction, and erred in denying a motion for bill of particulars.

The first count alleges that, following bankruptcy, the defendant fraudulently failed to inform the trustee of the existence of a certain sum of money previously received from a named finance company. The other four assert that shortly prior to bankruptcy, with fraudulent intent, he concealed certain sums of money in contemplation of bankruptcy. With respect to the first count, the contention that because defendant believed he was not entitled to a discharge he had no intent to deceive is peculiarly unpersuasive. So also on the evidence is the claim on the other counts that he did not anticipate bankruptcy. We have rarely seen stronger evidence of anticipation. Nor was the jury unwarranted in disbelieving defendant's explanation why he cashed five checks at five different times in the three weeks before bankruptcy at a bank other than his own, totalling over $6,000, with no proceeds put in his own bank, and with no records or mention furnished to the trustee. Defendant's testimony as to whether or not he kept any records is highly equivocal. The contention that a conviction was unwarranted is without merit.

With respect to the bill of particulars we may agree with the defendant that in the light of the recent amendment to Rule 7(f) of the Federal Rules of Criminal Procedure and its history, district courts should now approach motions for bills of particulars with more liberality than has sometimes, but not always, *United States* v. *Genstil*, D.Mass., 1962, 205 F.Supp. 604, been the custom. *United States* v. *Tucker*, S.D.N.Y., 1966, 262 F.Supp. 305. We might also agree that the court or government was unnecessarily restrictive in this case. However, each count of the indictment gave the dollar amount, and the date, and Count 1 named the payor. While it would have been better for the government to have disclosed certain record

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the latter part of 1961, petitioner, who was doing business as the Fiesta Furniture Company, began to experience difficulty meeting his financial obligations. In early February 1962, he entered into a trust mortgage agreement whereby he was to pay a certain sum to the trustee for his creditors each week. When petitioner failed to make the first payment on March 7, the trust mortgage was terminated, and at that time, he informed the attorney for the creditors that he was considering filing a voluntary bankruptcy petition (1 Tr. 35–41; 2 Tr. 82–83).[1]

[1] "Tr." preceded by the volume number refers to the three volume transcript of the trial proceedings; "1 R." refers to the record in the court below, copies of which are on file with the Clerk of this Court.

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Shortly thereafter, petitioner discounted several conditional sale contracts to the Time Finance Corporation and was paid by six checks which he received between March 16 and April 2, 1962. Petitioner did not deposit the checks in the bank account of the business (2 Tr. 58–59), but instead cashed them at another bank, at which he did not have an account (2 Tr. 51–52). On April 3, 1962, an involuntary bankruptcy petition was filed against petitioner, and he was adjudicated a bankrupt on April 18 of that year (1 Tr. 43; 2 Tr. 102–103; Gov. Ex. 14). The attorney for the trustee in bankruptcy testified that the only assets he received in petitioner's case were the proceeds of a sale of inventory and a check from an insurance company covering a fire loss incurred by petitioner in early 1962. He never received nor was he even informed about the checks petitioner received from Time Finance (1 Tr. 59–63, 67, 69, 81, 85–87).

Petitioner's failure to disclose the existence of five of the checks received from Time Finance and to turn over the proceeds to the trustee formed the basis of a five-count indictment charging that petitioner had fraudulently concealed assets from the trustee in bankrupty, in violation of 18 U.S.C. 152 (1 Tr. 8, 10–15, 28–30; Govt. Ex. 106). Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on all five counts, and was sentenced to concurrent terms of one year's imprisonment on each count. The court of appeals affirmed *per curiam* (Pet. App.).

Petitioner's sole objection to his conviction is based on the trial court's denial of his pretrial motion for a

bill of particulars, in which he sought, *inter alia,* the names of those from whom the funds alleged to have been concealed were obtained, the dates of the transactions, and all of the circumstances surrounding the obtaining of the funds and their subsequent concealment. Petitioner contends that the denial of this motion, together with the time lapse between the date of the offenses and the trial, prevented him from preparing an adequate defense.

However, the indictment set forth the dollar amounts alleged to have been concealed, the dates upon which the concealment initially occurred, and, on the first count, the source from whom the funds were received—the Time Finance Corporation. While that source was not disclosed on the face of the indictment as to counts two to five, petitioner's testimony at trial shows that he was not unaware that those counts also referred to funds received from Time Finance. Petitioner testified that he had used the proceeds of the Time Finance checks to purchase furniture, pay salesmen's commissions, and hire trucks to deliver the furniture. Although he was able to remember the names of those with whom he dealt during this period, he testified that the transactions had been conducted on a cash basis and he was unable to produce any records pertaining to them (2 Tr. 89–97; 3 Tr. 18–38). Moreover, petitioner's defense was predicated, as he concedes (Pet. 4), on alleged ignorance of the pendency of bankruptcy proceedings and on lack of fraudulent intent. To the extent that the source of the funds would have been material to that defense, which

was based on what petitioner did with the money after its receipt, it is evident from the record that he was not taken by surprise.

The purpose of Rule 7(f), Fed. R. Crim. P., is to require the disclosure of only those facts necessary to particularize the charge and prevent subsequent prosecution for the same offense. The revised rule does not require disclosure of the evidentiary details of the government's case. The determination of the need for a bill of particulars rests in the discretion of the district court, which was not abused in this case. See *Wilkins* v. *United States*, 376 F. 2d 552, 563 (C.A. 5), certiorari denied, 389 U.S. 964; *Ross* v. *United States*, 374 F. 2d 97, 103 (C.A. 8), certiorari denied, 389 U.S. 882; *Ray* v. *United States*, 367 F. 2d 258, 263 (C.A. 8), certiorari denied, 386 U.S. 913; *Cook* v. *United States* 354 F. 2d 529, 531 (C.A. 9). And the fact that petitioner appeared to have no difficulty specifying the numerous persons to whom he paid the proceeds of the Time Finance checks substantially refutes any claim that he was prejudiced either by the denial of the motion alone, or in conjunction with the lapse of time between the offenses and trial.[2] Indeed, although he could recall those persons—whose testimony would presumably have been

[2] It is clear that there was no "intentional or oppressive" delay in prosecuting this case. Petitioner's possible involvement in numerous bankruptcy schemes was under continuous investigation from early 1962 until the return of the 1966 indictment. The "delay" between the date of indictment, March 1966, and trial, May 1967, was occasioned primarily by the death of the judge to whom the case originally had been assigned.

crucial to his defense—petitioner acknowledged, upon questioning by the court, that he had made no attempt to find them and obtain their testimony (3 Tr. 52–53).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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